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In the Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-161

FRANK O. GUNTER, SUPERINTENDENT,
MASSACHUSETTS CORRECTIONAL INSTITUTION, WALPOLE,
AND
FRANK A. HALL,
COMMISSIONER OF CORRECTION,
PETITIONERS,

v.

ALAN LLOYD LUSSIER,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioners request that a writ of certiorari be issued to the Court of Appeals for the First Circuit. This is a cross-petition and is intended to be contingent upon the granting of certiorari in *Lussier* v. *Gunter*, No. 76-7000, filed June 28, 1977.

Opinions Below.

The opinion of the United States Court of Appeals for the First Circuit is reported at 552 F. 2d 385 (1977) (Appendix A, 1a-9a). The opinion of the United States District Court for the District of Massachusetts is unreported, but is appended to this petition (Appendix B, 10a-12a). The opinion of the Supreme Judicial Court of Massachusetts is reported at 364 Mass. 414, 305 N.E. 2d 499 (1973) (Appendix C, 13a-24a).

Jurisdiction.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1). The opinion and judgment of the Court of Appeals were entered on March 31, 1977. On July 7, 1977, Mr. Justice Brennan extended until July 28, 1977, the time in which this petition may be filed.

Questions Presented.

1. Whether the respondent's failure to comply with the Massachusetts contemporaneous objection rule constituted a waiver sufficient to bar federal habeas relief in the absence of "cause" or "prejudice."

2. Whether the Massachusetts Supreme Judicial Court's consideration of the claim that plain error had occurred at the respondent's trial authorized the United States Court of

Appeals to overlook the respondent's failure to comply with the Massachusetts contemporaneous objection rule.

Statutory Provisions.

Massachusetts General Laws, c. 278, § 33E, provides as follows:

> "The clerk shall, as speedily as possible but in any event within ten days after the filing of the assignment of errors or within such further time as a justice of the superior court may for cause allow, transmit the bound copy of the transcript of the evidence, the summary of the record and the assignment of errors, which together shall constitute the record on appeal, to the supreme judicial court for the county in which the case is pending or to the supreme judicial court for the commonwealth whichever first has a law sitting, including an adjourned sitting in the case of the court for the commonwealth, after the assignment of errors is filed, and upon receipt of the same such appeal shall forthwith be entered by the clerk on the docket of such court. Immediately, upon transmission of the record on appeal as herein provided, the clerk shall notify counsel for the defendant and for the commonwealth of such transmission. Except in a capital case, the entry of the appeal shall not transfer the case but only the questions to be determined. The supreme judicial court shall consider all questions of law fairly raised.
>
> "In a capital case as hereinafter defined the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence. Upon such consideration the court may, if

satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require (*a*) order a new trial or (*b*) direct the entry of a verdict of a lesser degree of guilt, and remand the case to the superior court for the imposition of sentence. For the purpose of such review a capital case shall mean a case in which the defendant was tried on an indictment for murder in the first degree and was convicted of murder either in the first or second degree. After the entry of the appeal in a capital case and until the filing of the rescript by the supreme judicial court motions for a new trial shall be presented to that court and shall be dealt with by the full court, which may itself hear and determine such motions or remit the same to the trial judge for hearing and determination. If a motion is so remitted, or if any motion is filed in the superior court after rescript, no appeal shall lie from the decision of that court upon such motion unless the appeal is allowed by a single justice of the supreme judicial court on the ground that it presents a new and substantial question which ought to be determined by the full court."

Statement of the Case.

The respondent was convicted of murder in the Massachusetts Superior Court, and his conviction was affirmed on appeal. *Commonwealth* v. *Lussier*, 364 Mass. 414, 305 N.E. 2d 499 (1973). He petitioned the United States District Court for a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241, 2254. The District Court denied his petition, holding that his failure to comply with the

Commonwealth's contemporaneous objection rule constituted a waiver which barred habeas relief in the absence of plain error. The Court of Appeals affirmed, holding that any error present was harmless beyond a reasonable doubt. *Lussier* v. *Gunter*, 552 F. 2d 385 (1st Cir. 1977).

The respondent's petition for federal habeas corpus arose out of a remark made during final argument by the Assistant District Attorney who prosecuted the case. During the course of his extensive closing, the Assistant District Attorney said, "I don't know how he got her down there. There's only one person that could tell us that."[1] The respondent did not object to this remark, nor did he request that the judge instruct the jury concerning it or take any other action. The judge's charge to the jury included extensive instructions on the respondent's privilege not to

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[1] In full context, the statement was:

"You may ask yourselves, 'Why did she leave with Lussier in the first place?'

"What did she see in this creepy-looking character?

"I don't know the answer to that one, why she left with him.

"A number of possibilities present themselves. Maybe some conversations took place as to who she was staying with, what's her address, a possible future date type of thing.

"Or, 'How much rent are you paying?'

"'There's a sweetheart of an apartment on the second floor, three bedrooms, a stone's throw from Northeastern. Want to come down and take a look at it?'

"There's no evidence of this. This is conjecture. This girl was drinking. Maybe she was half in the bag from the half dozen cans of beer she consumed.

"Perhaps he suggested, 'Come down to my apartment and get more beer.'

"Maybe he told her, there was a party down there. I don't know how he got her down there. ***There's only one person that could tell us that.*** But, in any event, she went with him." (Emphasis added.)

testify.[1] The respondent did not object to these instructions or request that they be extended or clarified. Nevertheless, on appeal to the Massachusetts Supreme Judicial Court and upon his petition for writ of habeas corpus, the respondent charged that the judge's failure to strike the remark and give special instructions concerning it constituted constitutional error.

The evidence against the respondent (which the District Court judge characterized as "a strong circumstantial case") established that on October 30-31, 1971, he attended a Halloween party in an apartment on the third floor of a

[1] "The third fundamental proposition is the following — and I am referring to that portion of the statute which is General Laws, c. 233, § 20, Part Third. While the defendant in this case did not testify, I told you that under the law he is presumed to be innocent.

"And, again, it's found in G.L., Ter. Ed. c. 233, § 20, Part Third, and I am quoting: 'the defendant in the trial of an indictment, complaint, or other criminal proceedings shall at his own request but not otherwise be allowed to testify, but his neglect or refusal to testify shall not create any presumption against him.'

"Our Supreme Judicial Court has interpreted that section of the statute and it has said time and time again that this is a privilege of the defendant which is guarded zealously by the courts. And his decision not to testify at the trial is a matter that cannot tend to incriminate him or create in the mind of the fact-finding tribunal, you the jury, in this case, any unfavorable circumstances and no unfavorable inferences can be drawn against him for his failure to so testify.

"The logic for this is simple, because under the law the Commonwealth has the burden of proof to prove guilt of the defendant when it charges him with an offense. That means that it must establish each and every element of the crime with which he is charged and to prove it beyond a reasonable doubt. The defendant is not obliged to prove that he is innocent.

"He is not obliged to assist in any way or to do anything when he is charged with an offense. He can remain absolutely mute. The Commonwealth's burden is to prove that he committed the offense charged. And he does not have to prove he did not commit it.

"As a matter of fact and as a matter of law, he has no obligations at all to disprove that which the Commonwealth alleges."

building in Boston. Although "scores" of people attended the party, the respondent was one of the few not in costume. The respondent was a resident superintendent of the building where the party was held.

The victim, a 19-year-old woman who was studying nursing at nearby Northeastern University, was also present at the party. Two eyewitnesses testified that, at approximately 2 a.m., she and the respondent left the party hand in hand. Approximately 18 hours later, her badly battered, nude body was found in a vacant apartment on the second floor of the same building. A resident of a first floor apartment of the building testified to hearing noises which tended to show that the murder had taken place not more than half an hour after the victim and the respondent had left the party together. The wounds upon the victim's body were consistent with repeated kicks with boots such as those the respondent was wearing.

This evidence was buttressed by the following facts:

(1) The following day, the respondent twice denied leaving the party with the victim. One denial took place before the body was found.

(2) The respondent's observed behavior during the remainder of the night of the party was somewhat peculiar, consistent with a theory that he was disposing of certain articles of the victim's clothing which were never found.

(3) Small amounts of blood matching the victim's blood type were found on the defendant's boots and clothing. This last item was undercut to a considerable degree by cogent and convincing evidence that another person of the same blood type had been involved in a fight during the party and had shed blood. How much blood was shed and respondent's proximity to the event remained in dispute.

(4) The respondent was aware of the fact that the apartment on the second floor was vacant. He had helped clean the apartment the preceding day.

Reasons for Granting the Writ.

The petitioners intend to press this cross-petition only if the petition of Alan Lloyd Lussier (No. 76-7000), filed on June 28, 1977, is granted. If the original petition should be granted, it would be inequitable to preclude the petitioners from presenting the arguments to which they have consistently adhered throughout this litigation and which this Court has subsequently accepted in another case. The Court of Appeals did not consider these arguments, because it decided in favor of the petitioners on the other grounds.

I. The Respondent is Not Entitled to Federal Habeas Corpus Relief in the Absence of "Cause" or "Prejudice."

Throughout this litigation, the petitioners have consistently argued that the standard of review on federal habeas corpus was established when the respondent failed to comply with the Massachusetts contemporaneous objection rule. The petitioners have argued that, in these circumstances, the writ can be granted only if the Court finds that "plain error" exists within the meaning of Fed. R. Crim. P. 52(b) and the similar Massachusetts rule. See Mass. G.L. c. 278, § 33E; *Commonwealth* v. *Freeman*, 352 Mass. 556, 563-64, 227 N.E. 2d 3, 8-9 (1967). Subsequent to the decision of the Court of Appeals, this position has been completely accepted by this Court, with only verbal changes. *Wainwright* v. *Sykes*, 45 U.S.L.W. 4807 (June 23, 1977). The Court held that failure to comply with a state procedural rule constitutes an independent and adequate state ground precluding federal habeas in the absence of cause or prejudice.

The rule in *Wainwright* v. *Sykes* governs the present case and the Court of Appeals ought to have decided the case on that basis. The court thought it prudent, however, despite this Court's decisions in *Francis* v. *Henderson*, 425 U.S. 536 (1976), and *Estelle* v. *Williams*, 425 U.S. 501 (1976), to avoid the necessity of deciding the question presented by the petitioners by deciding the case on other grounds. Thus, the Court of Appeals found that any error present was harmless "beyond a reasonable doubt." Although this decision was correct and is supported by the evidence, its effect was to place upon the petitioners a heavier burden than the law required them to bear. If the case is relitigated, this error should be rectified.

II. The Court of Appeals Erred in Holding that the Massachusetts Courts had Overlooked Respondent's Waiver.

The decision of the Court of Appeals to reject the petitioners' arguments and reach the merits was based on *Warden* v. *Hayden*, 387 U.S. 294, 297 n. 3 (1967). In that case, the Court remarked that when a state court has overlooked a procedural failure, a federal habeas court may also do so. The Court of Appeals apparently concluded that the Massachusetts Supreme Judicial Court had overlooked the respondent's failure to observe the Commonwealth's contemporaneous objection rule.

> "On appeal to the Massachusetts Supreme Judicial Court, Lussier argued that the prosecutor's comments were 'improper and [he] challenge[d] the failure of the trial judge to order the remarks struck when they were made or to subsequently instruct the jury to disregard

them.' *Commonwealth* v. *Lussier*, 364 Mass. 414, 424, 305 N.E. 2d 499, 505 (1973). The court ruled:

> "'While we do not approve of some portions of the prosecutor's summation to the jury, when viewed in the overall context they are not so prejudicial as to justify reversal. . . . Moreover, there is a simple and obvious reason for the trial judge's alleged "failure" to strike them or attempt to mitigate their impact as effectively as the defendant now argues was appropriate. That is, defense counsel took no exceptions at the close of the prosecutor's summation, and made no request for special instructions despite ample opportunity to do so . . .. *While under G.L. c. 278, § 33E, we will, in appropriate circumstances, act to rectify a substantial risk of a miscarriage of justice, despite the absence of exceptions in the record, we do not feel that such action is warranted here.*' *Id.* at 424-25, 305 N.E. 2d at 506.

"In a footnote the Supreme Judicial Court quoted the prosecutor's remarks which were asserted to be prejudicial. With reference to the comment that '[t]here's only one person that could tell us that,' the court stated:

> "'This last remark would raise serious questions as to the infringement of the defendant's Fifth Amendment right to remain silent, see *Griffin* v. *California*, 380 U.S. 609, 611, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), were it not for that portion of the judge's charge specifically explaining to the jury that the defendant had the right not to testify, and that no unfavorable inferences were to be drawn from his exercising that right.' *Id.* at 424 n. 3, 305 N.E. 2d at 506 n. 3." (Ellipses in original; emphasis added.) 552 F. 2d at 387-388 (Appendix A, 4a-5a).

The Court of Appeals erred in deciding, on the basis of this language, that it was free to reach the merits of the respondent's claim. The treatment given the matter by the Supreme Judicial Court was obviously in furtherance of the Massachusetts plain error rule. The court specifically noted the absence of an exception, but recognized its obligation to consider the alleged error further to determine whether it required action despite that failure. In determining the remarks were not "so prejudicial as to justify reversal," the court was clearly holding that there was no plain error. Such a treatment by a state court was not sufficient to invoke the doctrine of *Warden* v. *Hayden*. *Brathwaite* v. *Manson*, 527 F. 2d 363, 366 (2d Cir. 1975), *cert. granted*, 425 U.S. 957 (1976) (No. 75-871) (dictum).

Virtually every jurisdiction in the country has a plain error rule. Consequently, virtually every appellate court is obliged to consider alleged error under the terms of that rule even though an appellant has not complied with the applicable procedural rules. To hold that such obligatory consideration releases an appellant from the effects of his waiver would be to render nugatory the decisions of this Court in *Wainwright*, *Francis*, and *Estelle*. The Court of Appeals for the Second Circuit recognized this obvious fact when it stated that plain error treatment by a state court would not bring a case within the principle of *Warden* v. *Hayden*. That statement should be adopted by this Court.

In the present case, the Court of Appeals apparently decided that the Supreme Judicial Court's treatment of the matter was plenary consideration on the merits. This

decision is plainly erroneous.[3] The only question which was before the federal courts was whether or not there was constitutional error. As the District Court judge put it:

> "[T]he error we are talking about, it is agreed by everyone, is the error of the trial judge in not singling out for special, explicit jury attention the almost casual comment of the prosecuting attorney made in the course of the prosecuting attorney's final argument." (Appendix B, 11a.)

This question was also presented to the Supreme Judicial Court and that court explicitly refused to decide it. The court noted the absence of either a request for instructions or an exception and stated that, under these circumstances, it need not act. This clear holding cannot be dismissed by referring to the court's footnote. Even in the absence of an exception, the court was obliged to consider whether the error alleged was so egregious as to constitute plain error. Read in the light of the court's holding, the footnote clearly does nothing more than fulfill this function. The reading of the Court of Appeals is strained and invades the province of the Supreme Judicial Court. It should not be upheld by this Court.

[3] If this is a factual question, it is one which was resolved in the petitioners' favor by the District Court. The Court of Appeals erred by needlessly disturbing this finding. If this is a legal question, it is one upon which this Court should pass in resolving the case.

Conclusion.

If certiorari is granted in *Lussier* v. *Gunter*, No. 76-7000, it should be granted in this case. If certiorari is denied in No. 76-7000, the Court need not consider the present petition.

Respectfully submitted,

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Appendix A.

United States Court of Appeals for the First Circuit.

No. 76-1282.
[Caption omitted in printing.]

Before COFFIN, Chief Judge, CLARK, Associate Justice, (Retired), CAMPBELL, Circuit Judge.

LEVIN H. CAMPBELL, Circuit Judge.

The district court dismissed appellant Lussier's petition for a writ of habeas corpus under 28 U.S.C. § 2254 and he appeals.

Lussier was convicted after a jury trial in Massachusetts Superior Court of first degree murder committed with extreme cruelty or atrocity and was sentenced to life imprisonment. The Commonwealth introduced evidence that in 1971, at the time of the murder, Lussier was a part-time resident superintendent at an apartment building on Westland Avenue, Boston. Late in the evening of October 30 he arrived at a Halloween party in the building which was attended by the victim, a 19-year-old student nurse, and scores of other persons. While Lussier was there a fight broke out between one Devereaux and others. The testimony was conflicting as to the amount which Devereaux bled and petitioner's proximity to him. The defense contended that the type O positive blood which was later found caked in small amounts on Lussier's boot and clothing had originated with Devereaux.

There was evidence that Lussier conversed with the victim and several others for about one half hour. Two participants in this conversation testified that they later saw petitioner and the victim leaving the apartment hand in hand. About eighteen hours after the couple had left the party, the victim's badly battered, nude body was found in a vacant apartment in the same building. A downstairs neighbor's testimony recalling sounds of a struggle and a loud thud emanating from the vacant apartment at about 2:30 a.m. on the night of the party tended to show that the murder occurred no later than one half hour after petitioner was observed leaving the party with the victim. The wounds about the victim's head were consistent with those which might have been inflicted by repeated kicks with boots such as those worn by petitioner. The victim's blood was of type O positive, the same type as that found on petitioner's boot. There was testimony indicating that petitioner had been aware that the apartment was vacant, he having assisted in cleaning it on the day before the party.

The prosecutor's closing statement to the jury included a number of comments the propriety of which Lussier has since challenged. The comment which Lussier focuses upon here, and which he argues entitles him to issuance of a writ of habeas corpus as in violation of his privilege against self incrimination, is the following:

> "Maybe he told her, there was a party down there. I don't know how he got her down there. ***There's only one person that could tell us that.*** But, in any event, she went with him." [Emphasis supplied.]

Lussier's attorney, who does not now represent him, did not object or request a curative instruction from the court. The court's lengthy jury instructions included, however, the following:

> "The third fundamental proposition is the following — and I am referring to that portion of the statute which is General Laws, c. 233, § 20, Part Third. While the defendant in this case did not testify, I told you that under the law he is presumed to be innocent.
>
> "And, again, it's found in G.L. Ter. Ed. c. 233, § 20, Part Third, and I am quoting: 'the defendant in the trial of an indictment, complaint, or other criminal proceedings shall at his own request but not otherwise be allowed to testify, but his neglect or refusal to testify shall not create any presumption against him.'
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> "Our Supreme Judicial Court has interpreted that section of the statute and it has said time and time again that this is a privilege of the defendant which is guarded zealously by the courts. And his decision not to testify at the trial is a matter that cannot tend to incriminate him or create in the mind of the fact-finding tribunal, you the jury in this case, any unfavorable circumstance and no unfavorable inferences can be drawn against him for his failure to so testify.
>
> "The logic for this is simple, because under the law the Commonwealth has the burden of proof to prove guilt of the defendant when it charges him with an offense. That means that it must establish each and every element of the crime with which he is charged and to prove it beyond a reasonable doubt. The defendant is not obliged to prove that he is innocent.
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> "He is not obliged to assist in any way or to do anything when he is charged with an offense. He can

remain absolutely mute. The Commonwealth's burden is to prove that he committed the offense charged. And he does not have to prove that he did not commit it.

"As a matter of fact and as a matter of law, he has no obligations at all to disprove that which the Commonwealth alleges."

On appeal to the Massachusetts Supreme Judicial Court, Lussier argued that the prosecutor's comments were "improper and [he] challenge[d] the failure of the trial judge to order the remarks struck when they were made or to subsequently instruct the jury to disregard them." *Commonwealth* v. *Lussier*, 364 Mass. 414, 424, 305 N.E. 2d 499, 505 (1973). The court ruled:

"While we do not approve of some portions of the prosecutor's summation to the jury, when viewed in the overall context they are not so prejudicial as to justify reversal. . . . Moreover, there is a simple and obvious reason for the trial judge's alleged 'failure' to strike them or attempt to mitigate their impact as effectively as the defendant now argues was appropriate. That is, defense counsel took no exceptions at the close of the prosecutor's summation, and made no request for special instructions despite ample opportunity to do so . . .. While under G.L. c. 278, § 33E, we will, in appropriate circumstances, act to rectify a substantial risk of a miscarriage of justice, despite the absence of exceptions in the record, we do not feel that such action is warranted here." *Id.* at 424-25, 305 N.E. 2d at 506.

In a footnote the Supreme Judicial Court quoted the prosecutor's remarks which were asserted to be prejudicial. With reference to the comment that "[t]here's only one person that could tell us that," the court stated:

"This last remark would raise serious questions as to the infringement of the defendant's Fifth Amendment right to remain silent, see *Griffin* v. *California*, 380 U.S. 609, 611, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), were it not for that portion of the judge's charge specifically explaining to the jury that the defendant had the right not to testify, and that no unfavorable inferences were to be drawn from his exercising that right." *Id.* at 424 n. 3, 305 N.E. 2d at 506 n. 3.

In the district court the Commonwealth resisted the habeas corpus petition on grounds that Lussier had waived objection to constitutional errors in failing to take exception to the prosecutor's comment. According to this argument, Massachusetts' statutory "miscarriage of justice" exception to a waiver is the equivalent of the federal "plain error" rule, Fed. R. Crim. P. 52(b). The Commonwealth also argued that the prosecutor's comment was harmless in light of the trial judge's extensive instructions on the defendant's right to remain silent. The district court denied the petition.

On appeal, Lussier presses the argument that the prosecutor's remark was an unconstitutional and harmful comment on an accused's exercise of the right to remain silent. He contends that his attorney's failure to except was not a "deliberate bypass" of state court procedure, *see Fay* v. *Noia*, 372 U.S. 391, 483, 83 S.Ct. 822, 9 L. Ed. 2d 837 (1963), for the prosecutor's misconduct had put him in the

position of making a "grisly choice" between suffering the comment in silence and objecting, thereby calling further attention to the prejudicial remark. He denies that a calculated tactical decision to forego objection was ever made. *Id.* at 439, 83 S. Ct. 822. Furthermore, Lussier argues, the Supreme Judicial Court actually reached the constitutional issue, so the Commonwealth's reliance on a theory of waiver is inapposite.

[1] We need not decide whether or to what extent *Fay's* "deliberate by-pass" standard has been broadened by the Supreme Court in giving effect to state rules concerning waiver. *See Francis* v. *Henderson*, 425 U.S. 536, 96 S. Ct. 1708, 48 L. Ed. 2d 149 (1976); P. Bator, et al., Hart & Wechsler's The Federal Courts and The Federal System 256-58 (Supp. 1977). We agree with petitioner that the Supreme Judicial Court decided the substance of his constitutional claim. It characterized the prosecutor's offensive comments as "not so prejudicial as to justify reversal." *Id.*, 364 Mass. at 424, 305 N.E. 2d at 506. The comment that is the subject of this appeal was said to "raise serious questions as to the infringement of the defendant's Fifth Amendment right to remain silent . . . were it not for that portion of the judge's charge specifically explaining that the defendant had the right not to testify, and that no unfavorable inferences were to be drawn from his exercising that right." 364 Mass. at 424 n. 3, 305 N.E. 2d at 506 n. 3. While it also stressed the lack of exceptions and requests for special instructions, we are satisfied that the court reached and decided the merits of the constitutional issue presented in this appeal. We are therefore free to consider it. *Warden* v. *Hayden*, 387 U.S. 294, 297 n. 3, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967).

In *Griffin* v. *California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 1233, 14 L. Ed. 2d 106 (1965) the Supreme Court

held that "the Fifth Amendment, . . . in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." In determining whether Lussier's fifth amendment rights were infringed we must therefore inquire whether the prosecutor's statement was a "comment . . . on the accused's silence." The tenth circuit has formulated the following test:

> "[W]hether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Knowles* v. *United States*, 224 F. 2d 168, 170 (10th Cir. 1955).[1]

The comment in this case came after the prosecutor had speculated about how Lussier might have lured the victim to the vacant apartment:

> "I don't know how he got her down there. There's only one person that could tell us that."

It is not entirely clear who the "one person" was supposed to be. Either the prosecutor was rhetorically invoking the

[1] *Accord, United States* v. *Williams*, 172 U.S. App. D.C. 290, 521 F. 2d 950, 953 (1975); *United States* v. *Aldridge*, 484 F. 2d 655, 660 (7th Cir. 1973), *cert. denied*, 415 U.S. 921, 94 S. Ct. 1423, 39 L. Ed. 2d 477 (1974); *United States* v. *Biondo*, 483 F. 2d 635, 644 (8th Cir. 1973); *cert. denied*, 415 U.S. 947, 94 S. Ct. 1468, 39 L. Ed. 2d 563 (1974); *Doty* v. *United States*, 416 F. 2d 887, 890 (10th Cir. 1968), *vacated on other grounds*, 401 U.S. 1066, 91 S. Ct. 1247, 28 L. Ed. 2d 542 (1971).

victim ("there's only one person that could tell us that and she no longer can"), or else he was pointing his finger at the silent Lussier. *Cf. Rodriguez-Sandoval* v. *United States*, 409 F. 2d 529, 531 (1st Cir. 1969); *Desmond* v. *United States*, 345 F. 2d 225, 227 (1st Cir. 1965). We cannot quite say, in the words of the tenth circuit, that the remark was "manifestly intended or was of such character that the jury would naturally and necessarily take it" as a comment on Lussier's failure to testify.

[2, 3] Even, however, if the comment were interpreted as coming within the class of prosecutorial comment which the fifth amendment forbids, we believe that the Superior Court justice's lengthy instruction to the jury on a defendant's right not to take the stand rendered the improper remark "harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). While the judge did not immediately interrupt argument to admonish the prosecutor and instruct the jury,[1] his instruction at the conclusion of the trial on Lussier's right to remain silent was unusually emphatic and complete. It far exceeded the more perfunctory general instructions which have often been found inadequate to

[1] Petitioner notes that this circuit, in *United States* v. *Flannery*, 451 F. 2d 880, 882 (1 Cir. 1971), announced that in future cases we would reverse a conviction where after a prosecutorial comment on a defendant's silence, the trial judge did not immediately and *sua sponte* interrupt the argument to admonish the prosecutor and instruct the jury. The *Flannery* rule, as petitioner concedes, rests on our supervisory powers over the federal courts within this circuit. It was not addressed to the state judiciary, and insofar as it might require actions in some cases going beyond the strict requirements of the Constitution, we shall not apply it in *habeas* review of state proceedings. This is not to say that the immediacy and force of a state judge's corrective actions will not be important in determining whether the prejudice from an unconstitutional comment has been neutralized.

combat specifically prejudicial remarks. The prosecutor's comment was itself brief, indirect and isolated. It plainly could and preferably should have been dealt with by an immediate, *sua sponte* instruction. But given the thoroughness of the later instructions, we think that whatever prejudicial impact the comment had in heightening the jury's awareness of defendant's failure to take the stand was adequately offset. *See United States* v. *Biondo*, 483 F. 2d 635, 645 (8th Cir. 1973), *cert. denied*, 415 U.S. 947, 94 S. Ct. 1468, 39 L. Ed. 2d 563 (1974); *United States* v. *Mahanna*, 461 F. 2d 1110, 1114-15 (8th Cir. 1972); *United States* v. *Alloway*, 397 F. 2d 105, 113 (6th Cir. 1968); *Jacobs* v. *United States*, 395 F. 2d 469, 477-78 (8th Cir. 1968). *Cf. United States* v. *Schartner*, 426 F. 2d 470, 478 (3d Cir. 1970); *United States* v. *White*, 444 F. 2d 1274, 1278 (5th Cir.), *cert. denied*, 404 U.S. 949, 92 S. Ct. 300, 30 L. Ed. 2d 266 (1971). *But see Berryman* v. *Colbert*, 538 F. 2d 1247, 1249-50 (6th Cir. 1976); *United States* v. *Handman*, 447 F. 2d 853, 855 (7th Cir. 1971).

Affirmed.

Appendix B.

United States District Court for the District of Massachusetts.

[Caption omitted in printing.]

Proceedings.

THE CLERK: Civil Action 75-3931-G, Alan Lussier versus Frank Hall.

. . . . . .

THE COURT: I will state the ruling and the grounds therefor, and the ruling is that the petition is denied. The ground is that in my view, the commonwealth is correct in holding or in contending that the Davis and Allen cases, and I refer to Davis versus United States, 411 U. S. 233, in the year 1973, and United States ex rel. Allum, A-l-l-u-m, versus Twomey, T-w-o-m-e-y, Seventh Circuit, 1973, 484 Federal 2d 740, engraft on habeas corpus procedure the federal plain error whenever a state has adopted a similar rule.

There is not a great deal that can be added, except that I should make some subsidiary or ancillary findings.

I consider that the case in the state court was a strong circumstantial evidence case. I do not think it could fairly be said that the case was overwhelming, but nevertheless strong and clearly ample to support the conviction, in my view.

I think that the error of the state court judge was arguably harmless, but I do not rest the decision here on that ground, because I think it is a close question, and I think that it is difficult to say that the error was harmless

beyond a reasonable doubt. The Chapman standard is a relevant standard, and at least in the habeas cases that have come before me, I have interpreted it to be, I think, a stricter standard than has been interpreted in some other parts of the country. I am not talking about the First Circuit or this court, but in other parts of the country.

I read syllabuses of cases in which courts hold error to be harmless, and I have real difficulty in agreeing with those decisions if Chapman requires, as we know it does, that it be harmless beyond a reasonable doubt. Nevertheless, the error we are talking about, it is agreed by everyone, is the error of the trial judge in not singling out for special, explicit jury attention the almost casual comment of the prosecuting attorney made in the course of the prosecuting attorney's final argument.

The type of prejudicial statement that was arguably made by the D. A. could, it seems to me, be cured as well in the course of general, boilerplate instructions on the defendant's rights under the Fifth Amendment, which were given, as by singling out the particular statement made by the prosecuting attorney and giving it an emphasis that, in the context of this case, I think it very probably did not have in the jury's minds. In the context in which it was made, I think it is arguable that the jurors might have thought that the prosecutor was referring to the deceased, the victim of this crime.

I recognize that the past tense was not employed, but still it was certainly not an explicit appeal to the jury's making an inference — to an inference permissible from the defendant's failure to testify. It simply does not strike me as having been made in a context where the jury would probably so interpret it, so that I have no hesitancy at all in concluding, as I do, that it was not plain error.

If, as I think the law is, the plain error rule is properly applied in the course of a habeas corpus proceeding in this court, well, then, that is determinative of the case. I think I have considered the nature of the case, the circumstantial evidence against the petitioner, the nature of the error, and my understanding as to what the correct rule of law is here, and it is for those reasons that the petition is denied.

This statement, when Mrs. Fitzhugh types it up, constitutes the Court's memorandum of decision, and that is the end of this case, at least in this court.

(Thereupon the hearing was concluded.)

COMMONWEALTH *vs.* ALAN L. LUSSIER.

Suffolk. November 5, 1973. — December 18, 1973.

Present: TAURO, C.J., REARDON, QUIRICO, KAPLAN, & WILKINS, JJ.

Homicide. Jury and Jurors. Constitutional Law, Due process of law, Equal protection of laws. *Practice, Criminal,* Fair trial, Argument by prosecutor, Election.

At the trial of an indictment for murder of a girl by beating her, the evidence, together with reasonable inferences to be drawn therefrom, was sufficient to support the jury's conclusion that the defendant was guilty beyond a reasonable doubt. [420-422]

At the trial of an indictment for murder, the rights of the twenty-four year old defendant under the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution were not violated by G. L. c. 234, § 1, in that it exempted from jury duty persons under twenty-two years of age. [423-424]

At the trial of an indictment for murder, although certain remarks made by the prosecutor in his closing argument were not approved by this court, when viewed in the overall context they were not so prejudicial as to justify reversal. [424-425]

At the trial of an indictment for murder, after the decision in *Furman* v. *Georgia,* 408 U.S. 238 (1972), the judge did not commit error by allowing inquiries, and eventual dismissal, of jurors who were opposed to the death penalty where the Commonwealth was not restricted to a rape-murder theory; this court was unable to conclude that the exclusion of jurors opposed to capital punishment resulted in an unrepresentative jury on the issue of guilt or substantially increased the risk of conviction. [425]

INDICTMENT found and returned in the Superior Court on January 12, 1972.

The case was tried before *Paquet,* J.

Lawrence D. Shubow for the defendant.

Thomas J. Mundy, Jr., Assistant District Attorney, for the Commonwealth.

TAURO, C.J. This is an appeal pursuant to G. L. c. 278, §§ 33A-33G, from a conviction of murder in the first degree committed with extreme atrocity or cruelty. The defendant, aged twenty-four at the time of his arrest, argues that (1)

young persons were unconstitutionally excluded from the jury in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution, (2) the verdict was based on insufficient evidence, (3) the prosecutor's summation argument was improper and prejudicial, (4) the trial court erred in failing to require the Commonwealth to elect among its theories of murder and in allowing the exclusion of jurors with strong views against capital punishment. We cannot agree.

The evidence, which was solely circumstantial as it related to the defendant's guilt or innocence, may be briefly summarized as follows. The victim, a nineteen year old third year student at Northeastern University's School of Nursing, on the evening of October 30, 1971, with her roommate and some friends went to a Halloween party on the third floor, apartment 32, at 72-74 Westland Avenue, Boston. The next night, around 7:30 P.M., she was found dead, badly beaten and bloodied, in a vacant apartment, number 22, on the second floor in the same building. From six to eight weeks prior to the party the defendant Alan Lussier had occupied apartment 14 along with three other men. The four performed janitorial services in lieu of rental payments, and on the day of October 29, Lussier, along with two of his roommates, had spent time cleaning and preparing apartment 22 for prospective tenants.

Lussier had been observed at the Halloween party by a number of witnesses. He had not been invited, and was one of the few persons out of between twenty-five and one hundred in attendance who had not worn a costume. Witnesses recalled his wearing brown leather square-toed boots, blue and white striped dungarees, and a black leather motorcycle jacket. These articles of clothing, along with a purple and white pin-striped shirt and a cat-faced ring, were all later identified as belonging to Lussier. Bloodstains were discovered on these items in the course of the police investigation, but only in the case of the right boot was there sufficient quantity of blood to allow for blood group identification. The F. B. I. identified the blood as "O positive." Two persons at the party were determined to be within this blood group — the victim, and one William Devereaux, who had been involved in an altercation during the course of the party, and with whom the defendant, according to the testimony, had been in near or actual contact during and after the altercation.

The Devereaux incident occurred about 12:30 or 12:45 A.M. Witnesses recalled that a group of persons had assaulted Devereaux in the vicinity of the kitchen and hallway in apartment 32, and that he had been bleeding afterwards. Devereaux was later taken to a hospital for stitches and minor oral surgery. One witness described the bleeding as "continuous" but not "massive." Another remembered that there were a couple of splotches of blood on the wall and on the casing of the kitchen entrance. A defence witness testified to the existence of a pool of blood in the hallway after the fight, but other witnesses either had no such recollection or described the "pool of blood" as the sticky residue of spilled beer.

Devereaux, who himself characterized his bleeding as "flowing every time I opened my mouth," was "almost positive," but "not absolutely 100% positive," that Lussier had come between him and his assailant and had broken up the fight. He testified to spitting out blood as a result of his injuries but could not recall whether he had spit or dripped any blood directly onto Lussier. Other witnesses were also unable to say whether Devereaux's blood had at some point come onto Lussier's person or clothing.

Immediately after the fight, Devereaux had been ushered out into the main hallway on the third floor of the apartment building. Witnesses testified that Lussier then appeared at the scene, described himself as superintendent of the building, and ordered Devereaux off the premises. Devereaux was still bleeding at that point and, according to one witness, was close to, but not in actual contact with, Lussier. ("The kid [Devereaux] was leaning against the wall. Alan Lussier was standing on this side of him — with his hand up against the wall — like that — a foot and a half away from.")

Devereaux soon left for the hospital.

After these events, about 1:15 A.M., Lussier, the victim, one James Yurkus and a Wayne Fricke were engaged in a conversation in the kitchen of apartment 32. Yurkus had met the victim previously, and Fricke had known her for at least two years as a student at Northeastern. Both testified that the group had remained in the kitchen for fifteen or twenty minutes. Yurkus recalled that the victim at some point during the conversation remarked to Lussier that all the superintendents she knew were "freaky," but when he asked her if he appeared that way, she answered, "No." About 1:30 A.M., the group moved into the living room where Fricke cleared an area for himself and the victim to sit. He testified that about fifteen minutes later, Lussier said to the victim, "I'd like to talk to you for a few minutes." Lussier then took her hand and they went out into the hallway of apartment 32, where the victim sat down in a chair. Fricke, who had intended to walk the victim home after the party observed the two talking in the hallway for the next fifteen minutes, until approximately 2 A.M., at which point they stood up, joined hands, and left the apartment through the back door. The victim was never seen alive again.

Kathleen Bahm lived in apartment 12, directly below apartment 22 where the victim's body was later found. She testified that around two fifteen she heard people, more than one, running in the apartment upstairs, and that five minutes later she heard a "loud thud as though someone fell." Her roommate, Sherry Klein, gave the same testimony.

According to Bryan McMahon, one of the defendant's roommates, Lussier came back to apartment 14 about two thirty, picked up some clothes, and departed for the apartment of his girl friend. Her testimony was that Lussier had come by that night, but she did not remember the time, and that he was there when she awoke the next morning. Witnesses testified to seeing Lussier return to his apartment building around 4 A.M.

That morning about eleven, Lussier knocked on the door of apartment 32 and spoke with a Charles Bell. Bell, who

knew Lussier only as someone who worked around the building, testified that Lussier said something to the effect that he, Lussier, had had quite a bit to drink at the party the night before, and inquired if there had been any trouble during the course of the evening.

By 7 P.M. the victim's roommate had not heard from her and was concerned about her whereabouts. She called Andrew Hildreth, another resident of apartment 32, who in turn went down to apartment 14 to ask Lussier whether he had seen the victim. Lussier said he had not seen her, nor had he left the party with her.

Shortly thereafter, about 7:30 P.M., the severely battered and bloody body of the victim was discovered in apartment 22 by Sherry Klein and her roommates.

Miss Klein testified that the victim's body was in the approximate location where she had heard the "thud" in the early morning. The group then contacted Lussier and his roommates in apartment 14 and told them what they had discovered. At the request of one of the members of the group, Lussier telephoned the police. His demeanor, according to Miss Klein, was calm.

The police arrived at eight thirty and began examining the scene. With the exception of the victim's hat, headband, and shoes, none of her clothing was found. A bloody footwear impression was discovered in the carpet near the body. A piece of bloodstained toilet tissue was found behind the toilet in the bathroom, and scrape marks were detected on the edge of a nearby sink. Along with Lussier's clothing, described earlier, and a blood-free chair leg, these items constituted the whole of the Commonwealth's physical evidence connecting Lussier with the crime.

Lussier was arrested on the same night, soon after the police discovered his bloodstained boots in apartment 14. At police headquarters, Lussier made a statement in which he admitted speaking to the victim in the kitchen at the party in apartment 32, but he denied sitting and speaking with her at any other time, and maintained that they had not left the party together.

At the trial, three expert witnesses testified as to the results of their examination of the victim's body, the defendant's clothing, and other objects found at the scene of the crime. Dr. George Curtis, Suffolk County medical examiner, who arrived at the murder scene at 10:30 P.M., testified to what he observed during his examination of the victim's body, and used photographic exhibits and slides to explain his observations. He placed the time of death somewhere between twelve midnight and seven in the morning of October 31, 1971. In his opinion, the cause of death was "multiple blows to the head." These injuries, he said, were consistent with the victim being kicked in the nose, eyes, forehead and probably the neck by a person wearing a boot. He also felt that the chair leg discovered in apartment 22, if used as a striking instrument, was consistent with some of the injuries. On cross-examination, Dr. Curtis acknowledged that other similar shoes or objects could have been used to inflict death.

Boston police officer William Charbonnier, an evidence technician of six months experience at the time he investigated the scene of the crime and the objects discovered there, also testified for the Commonwealth. So did Paul R. Bidez, an F. B. I. agent who analyzed some of the evidence in Washington. Charbonnier testified that he had made visual observations and performed benzidine tests on the boots identified as belonging to Lussier. The right boot proved positive for blood in the area where the heel and leather parts joined and on the inside of the strap. The subsequent F. B. I. analysis determined the blood to be "O positive." The benzidine test on the left boot also proved positive, but the amount of blood was insufficient to allow for blood grouping. On the right boot, Charbonnier had initially detected a pattern of bloodstaining which he characterized as "directional," consisting of stains in an upward and rearward direction, as if the boot had been wiped off, but by the time of trial he was no longer able positively to identify such a pattern. Continuing in his testimony concerning the boots, Charbonnier stated that he had taken a footwear impression from the blood soaked carpet near the victim's body on the

night of his initial investigation. He had observed that the impression on the carpet was similar in dimension to the heel of the defendant's boots. The F. B. I. report proved the blood to be "O positive," but by the time of trial, the impression had become diffused to the point where scientific matching with Lussier's boot was impossible.

Charbonnier also gave the details of his analysis of other evidence used by the police to connect Lussier to the crime. Human blood was found on the left cuff of Lussier's purple and white striped shirt, on the left knee of his dungarees, and in the mouth of the figure of the head of a cat on his ring. However, because the amounts of blood were insufficient, the F. B. I. was unable to determine the blood type. But "O positive" blood was found on the toilet tissue discovered by Officer Charbonnier behind the toilet in apartment 22.

On this evidence, the jury returned a verdict against Lussier of first degree murder committed with extreme atrocity or cruelty. The defendant asserts that this was error as a matter of law, and that he was entitled to a directed verdict. The argument is that, assuming all the facts in evidence to be true, reasonable inferences equally support the defendant's innocence as they do his guilt, and thus the conviction must be overturned because "[w]hen the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof." *Commonwealth* v. *Carter*, 306 Mass. 141, 147 (1940). See *Commonwealth* v. *Cooper*, 264 Mass. 368, 373 (1928), and *Commonwealth* v. *Shea*, 324 Mass. 710, 713-714 (1949). We disagree. Instead, we think that another well established principle governs the disposition of this case: "A jury may find a crime proved beyond a reasonable doubt even though the inference of guilt from the facts established is not inescapable or necessary." *Commonwealth* v. *Ehrlich*, 308 Mass. 498, 500 (1941). "It is enough if the inferences drawn from the circumstances be reasonable and possible." *Commonwealth* v. *Medeiros*, 354 Mass. 193, 197 (1968).

The evidence clearly gives rise to "reasonable and possible" inferences supportive of the jury's verdict. Testimony

indicated that Lussier and the victim left the party holding hands about 2 A.M. on October 31. While Lussier denied this in his statement to the police, a number of factors warranted a jury finding that the identifying witness was not mistaken. Lussier, without a costume at a costume party, was relatively conspicuous. The witness Fricke, who said he saw Lussier leave with the victim, had earlier spoken with Lussier in a group for at least fifteen minutes and thus was not likely to have so soon thereafter forgotten his appearance. Other witnesses had seen the two holding hands, a fact which further supports the likelihood that the couple eventually left the party together. And while these facts do not conclusively establish that Lussier and only Lussier could have been alone with the victim in apartment 22, "[i]t is not necessary to prove that no one other than the accused could have done the act. . . . That another might have had the opportunity to do the act goes only to the weight of the evidence." *Commonwealth* v. *Medeiros, supra,* at 197.

The next link in the chain of circumstantial evidence, that Lussier committed the murder in apartment 22 between 2 and 2:30 A.M., can also be reasonably inferred from the testimony of a number of witnesses. Both Miss Klein and her roommate Kathleen Bahm testified to hearing a "loud thud" and more than one person running around in that apartment at approximately 2:15 A.M. That this testimony was correct is even more likely in light of the fact that Miss Klein discovered the victim's body in the approximate location from which the "thud" emanated. And finally, since Lussier had cleaned up apartment 22 two days earlier, and therefore knew it was vacant, it was reasonable for the jury to infer that he would have considered the apartment to be a relatively safe place to commit his crime.

The physical evidence, while not conclusive, also points convincingly to the defendant's guilt. Lussier maintains that the bloodstains found on his clothing and boots are as consistent with his association with Devereaux as they are with his assaulting and murdering the victim. We believe, however, that the jury were justified in concluding otherwise.

There was no evidence that Lussier did, in fact, have actual contact with Devereaux or that Devereaux's blood came onto Lussier's person or clothing. Nor was there a positive showing that Devereaux's blood ever spilled onto the floor, thus leaving the jury without a satisfactory alternative explanation for the O positive blood found on the lower portions of Lussier's boot. That the bloodstains were connected with Lussier's presence in apartment 22 is made more plausible by Officer Charbonnier's testimony that he had initially detected a close similarity between Lussier's boot heel and the blood impression in the area of the carpet next to the victim's body. The fact that by the time of trial the impression was no longer clearly visible goes only to the weight of that testimony and does not necessarily discredit it.

The same may be said of Officer Charbonnier's initial observations of "directional" staining on Lussier's boot, a fact which when considered with the O positive bloodstained toilet tissue found in apartment 22, permits an inference that Lussier used the toilet tissue to wipe his shoes and points to Lussier's presence at the scene of the crime. Along with Dr. Curtis's testimony that the victim's fatal injuries were consistent with kicking and stomping by boots of the type worn by Lussier, this evidence is more than sufficient to establish a "reasonable and possible" inference that at least a large portion, if not all, of the blood detected on the boots and other articles of clothing was the victim's and not Devereaux's.

We conclude, therefore, that, giving consideration to all the evidence and reasonable inferences to be drawn therefrom, it was sufficient to support the jury's conclusion that the defendant was guilty beyond a reasonable doubt.

We now turn to questions raised by the defendant concerning the constitutionality of the Commonwealth's jury selection process, the propriety of certain of the prosecutor's remarks in his summation argument to the jury, and the failure of the trial judge to require the Commonwealth to elect among its theories of murder and to prevent inquiries of and eventual dismissal of prospective jurors who were opposed to the death penalty.

We need not pause long in disposing of the defendant's contention that G. L. c. 234, § 1,[1] as amended, violates the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution. The statute exempts from jury duty all persons under twenty-two years of age and, according to the defendant, in operation results in the exclusion of those under twenty-two and one-half and in the underrepresentation of those between twenty-two and one-half and twenty-four and one-half. Based on this analysis, and on the fact that he was twenty-four at the time of his arrest, the defendant makes two arguments: (1) he was deprived of his Due Process right to an impartial jury because persons within his age class and with similar backgrounds and outlooks were excluded from his jury, and (2) the statute on its face violates the Equal Protection clause because it arbitrarily discriminates against younger persons.

Recently, in *Commonwealth* v. *Therrien*, 359 Mass. 500, 507, we said in reference to an identical challenge to an earlier version of G. L. c. 234, § 1, which then exempted persons under twenty-five from jury service, "[the] argument that exclusion of those persons under twenty-five years of age from the jury panel was prejudicial to him requires no discussion. *King* v. *United States*, 346 F. 2d 123, 124 (1st. Cir.). See *Commonwealth* v. *Slaney*, 350 Mass. 400, 401-

[1]*Section 1.* A person of either sex qualified to vote for representatives to the general court, whether a registered voter or not, shall be liable to serve as a juror, except that the following persons shall be exempt: The governor; lieutenant governor; members of the council; state secretary; members and officers of the senate and house of representatives during a session of the general court; judges and justices of a court; county commissioners; clerks of courts and assistant clerks and all regularly appointed officers of the courts of the United States and of the Commonwealth; registers of probate and insolvency; registers of deeds; sheriffs and their deputies; constables; marshals of the United States and their deputies; and all other officers of the United States; attorneys at law; settled ministers of the gospel; officers of colleges; preceptors and teachers of incorporated academies; registered practicing physicians and surgeons; persons over seventy years of age; persons under twenty-two years of age; superintendents, officers and assistants employed in or about a state hospital, insane hospital, jail, house of correction, state industrial school or state prison; teachers in public schools; enginemen and members of the fire department of Boston, and of other cities and towns in which such exemption has been made by vote of the city council or the inhabitants of the town; Christian Science practitioners and readers, respectively; trained nurses; assistants in hospitals; attendant nurses; mothers of children under sixteen years of age or women having custody of such children and women members of religious orders."

402." We perceive no reason why we should treat the defendant's argument any differently today.[2]

Next, the defendant characterizes certain remarks made by the prosecutor in his closing argument as improper and challenges the failure of the trial judge to order the remarks struck when they were made, or subsequently to instruct the jury to disregard them. We have fully and carefully examined the record in this case. While we do not approve of some portions of the prosecutor's summation to the jury,[3] when viewed in the overall context they are not so prejudicial as to justify reversal. Compare, e.g., *Commonwealth* v. *De Christoforo*, 360 Mass. 531, 544 (1971) (Tauro, C.J., dissenting). Moreover, there is a simple and obvious reason for the trial judge's alleged "failure" to strike them or attempt to mitigate their impact as effectively as the defendant now argues was appropriate. That is, defence counsel took no exceptions at the close of the prosecutor's summation, and made no request for special instructions despite ample opportunity to do so (the judge did not charge the jury until the next morning). At the end of the charge to the jury, defence counsel asked for further explanation on one point, and when the explanation was completed, he indicated no

[2]Many other courts have been asked to recognize "young persons" as a distinct group for purposes of determining whether a jury panel includes a fair cross-section of the community, and have declined to do so. See, e.g., *King* v. *United States*, 346 F. 2d 123 (1st Cir. 1965) (21-25 year olds); *United States* v. *Ross*, 468 F. 2d 1213 (9th Cir. 1972) (21-24 year olds); *United States* v. *Olson*, 473 F. 2d. 686 (8th Cir. 1973) (18-20 year olds). A recent First Circuit case, *United States* v. *Butera*, 420 F. 2d 564 (1970), arguably to the contrary, is clearly distinguishable. There the court was concerned about the size of the excluded group, stating, "We cannot allow the requirement of a 'distinct' group to be applied so stringently with regard to age grouping that possible discrimination against a large class of persons — in our case, those between 21 and 34 — will be insulated from attack." *Id.* p. 570. Furthermore, the court in *Butera* found that the jury were properly drawn.

[3]THE PROSECUTOR: "I submit to you if [F. B. I.] Agent Bidez was the chemist on the scene on the night in question, I submit to you you wouldn't be up in that jury room more than two minutes deciding this case. But we are stuck with the evidence we have to present to *you*." THE PROSECUTOR: "What did she [the victim] see in this creepy-looking character?" THE PROSECUTOR: "I don't know how he got her down there. There's only one person that could tell us that." This last remark would raise serious questions as to the infringement of the defendant's Fifth Amendment right to remain silent, see *Griffin* v. *California*, 380 U. S. 609, 611 (1965), were it not for that portion of the judge's charge specifically explaining to the jury that the defendant had the right not to testify, and that no unfavorable inferences were to be drawn from his exercising that right.

further disagreement. While under G. L. c. 278, § 33E, we will, in appropriate circumstances, act to rectify a substantial risk of a miscarriage of justice, despite the absence of exceptions in the record, we do not feel that such action is warranted here. Compare *Commonwealth* v. *Freeman,* 352 Mass. 556, 563-564 (1967); *Commonwealth* v. *De Christoforo,* 360 Mass. 531, 544 (1971) (Tauro, C.J., dissenting).

The defendant's final argument is that in light of the recent decision of *Furman* v. *Georgia,* 408 U. S. 238 (1972), declaring the death penalty to be unconstitutional in certain situations, it was reversible error for the trial judge to question the jury panel concerning their views on the death penalty unless the prosecution restricted itself to a rape-murder theory. The contention is presumably based on the theory that even after the *Furman* case the death penalty could be constitutionally imposed for rape-murder, but it probably could not be imposed for other types of murder where the jury are vested with discretion in deciding on the appropriate penalty. Thus, the argument runs, the judge, by not forcing the Commonwealth to make this election, and by allowing inquiries, and eventual dismissal, of jurors who were opposed to the death penalty, unnecessarily deprived the defendant of "scrupled jurors" (see *Witherspoon* v. *Illinois,* 391 U. S. 510 [1968]) that he might have had on his jury if rape-murder were not going to be a basis of prosecution. We think this attenuated argument entirely misses the mark. In rejecting this contention, we need only repeat what the Supreme Court said in the *Witherspoon* case at 517-518: "We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction."

Pursuant to the requirements of c. 278, § 33E, we have reviewed the entire transcript and record and we found no reason either to order a new trial or to direct a verdict of a lesser degree of guilt.

Judgment affirmed.